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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HILL INTERNATIONAL, INC., DAVID L. RICHTER, CAMILLE S. ANDREWS, BRIAN W. CLYMER, ALAN S. FELLHEIMER, IRVIN E. RICHTER, STEVEN M. KRAMER and GARY F. MAZZUCCO, Defendants Below, Appellants, vs. OPPORTUNITY PARTNERS L.P., Plaintiff Below, Appellee.	No. 305, 2015 Court Below: Court of Chancery of the State of Delaware C.A. No. 11025-VCL

PLAINTIFF BELOW-APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

In this appeal, the Defendants, Hill International, Inc. ("Hill") and its board of directors, challenge the Chancery Court's application of what Defendants concede is unambiguous language of Hill's advance notice bylaw provisions to the undisputed facts concerning the fixing and announcement of the 2015 annual meeting of shareholders.[1] On March 12, 2015, Hill's board fixed the annual meeting date as June 9, 2015 (A55), and first announced that meeting date on April 30, 2015 when they filed their preliminary proxy statement with the U.S. Securities and Exchange Commission ("SEC"). (A59.) Plaintiff sent notice of its nominations and shareholder proposals on May 7, 2015, well within the 10 days of the announcement of the June 9 meeting date required by Hill's advance notice bylaws. (A71-76.)

The Chancery Court correctly determined that the bylaw's unambiguous reference to "the date of the annual meeting" meant the actual date of the annual meeting.[2] Because the first announcement of the June 9, 2015 meeting date was on April 30, 2015, less than 70 days before the meeting date, Hill's bylaws required that shareholders provide notice within 10 days of April 30, 2015. (A6-7 at § 2.2

[1] Citations herein to Defendants Below-Appellants' Opening Brief are in the form of "Defs. Br. at __."

[2] June 5, 2015 Order Granting Preliminary Injunction (D.I. 24) (Defs. Br. Ex. A) (the "June 5 Order"). The Court of Chancery's June 16 Order Entering Partial Final Judgment (D.I. 31) (Defs. Br. Ex. B) is cited herein as the "June 16 Order".

and A10 at § 3.3.) The Defendants ask this Court to expand the term "the date" to include the "anticipated date," the "approximate date," or other dates not referenced in the bylaws, to allow them to preclude shareholders from being able to vote for directors other than the two incumbents seeking re-election in 2015. Their argument is contrary to the plain language of the bylaws, rules of bylaw interpretation favoring the shareholder franchise, and case law interpreting similar bylaw language. Moreover, the Defendants, having delayed the shareholder meeting for 60 days, three times the length of time required by the Court of Chancery's preliminary injunction Order, to give them sufficient opportunity to "make certain … that [their own] board-nominated candidates are re-elected," (B52-56) have no basis to complain that they did not have "fair notice" of a shareholder nomination or proposal, which is the only legitimate purpose of an advance notice bylaw provision.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly enforced the plain language of the bylaws -- "in the event that less than seventy (70) days notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by a stockholder, to be timely, must be received no later than the close of business on the tenth (10^{th}) day following the day on which such notice of the date of the annual meeting was mailed or such public disclosure was made, whichever occurs first." (A6-7 at § 2.2 and A10 at § 3.3.) The June 9, 2015 annual meeting date was first disclosed on April 30, 2015. (A55; A59; June 5 Order at ¶8.) Thus, the Chancery Court correctly determined that Plaintiff's May 7, 2015 letter was timely.[3]

In reaching its conclusion, the Court of Chancery relied upon the "plain language" of the Bylaw, which indicates that the notice or public disclosure that would trigger the bylaw "must state the actual date of the meeting." June 5 Order at ¶¶ 2-3; 8. Thus, the Court of Chancery determined that a statement regarding an "anticipated on or about date" for the 2015 meeting, contained in Hill's 2014 proxy statement filed more than 10 months before the 2015 meeting date was chosen, did

[3] Defendants devote much of their argument to an advance notice letter dated April 13, 2015 that is not the subject of this appeal. *See* Defs. Br. at 2-3, 9-11, 17-18, 21-23. Although Plaintiff disputes that the April 13^{th} letter was untimely or deficient in any respect, these issues are not before the Court at this time.

not trigger the Bylaw; that was merely "an indication of a possible future date." June 5 Order at ¶6.

Defendants assign error to the Court of Chancery's holding that the Bylaw deadline could "be triggered only by a notice or public disclosure setting forth the 'actual' or 'specific' date – rather than the 'anticipated' date – of the annual meeting." Defs. Br. at p. 19. They argue that what the Vice Chancellor believed to be plain and unambiguous was entirely unreasonable. Defs. Br. at p. 20 ("a novel holding;" "woven from whole cloth;" and a "*non sequitur*"). But there is nothing novel or unreasonable about applying established contract principles to bylaws and giving words their plain, common and normal meaning. *See also Sherwood v. Ngon*, 2011 WL 6355209 (Del. Ch. Dec. 20, 2011) (addressing similar bylaw language and concluding that advance notice was timely when given within 10 days of the announcement of a postponement of an annual meeting, resulting in a new meeting date.)

Defendants' theory is vaguely based on "the Company's consistent prior practice," (Defs. Br. at p. 4) but they have offered no evidence that the Company ever addressed an advance notice from a shareholder before this dispute. Moreover, extrinsic evidence is not admissible as to unambiguous bylaws and "doubt is resolved in favor of the stockholders' electoral rights." June 16 Order at

¶5; *cf. Salamone v. Gorman*, 106 A.3d 354, 376 (Del. 2014) ("A court ought not to resolve doubts in favor of disenfranchisement").

As the Chancery Court correctly concluded: "[t]he purpose of an advance notice bylaw is to give a company advance notice of matters to be considered at a meeting of stockholders so that the Company is not surprised by a proposal from the floor. … That purpose has been served." June 16 Order ¶ 5. Moreover, the Defendant directors concede that they have sufficient notice now that they have helped themselves to five extra weeks to run their proxy contest, far more time than was required by the Chancery Court's preliminary injunction.

2. Denied. The injunction was properly granted based on undisputed facts and the plain language of Hill's bylaws. Furthermore, Defendants never asserted the need for security in the lower court, nor did they introduce any evidence of potential monetary damage in the lower court. They had the opportunity to do so in their opposition papers, at the hearing, and then when they moved to convert the temporary injunction into a final order. *Guzzetta v. Service Corp. of Westover Hills*, 7 A.3d 467, 470 (Del. 2010) (request for injunction bond must be supported by facts). In any event, having sought and obtained a final order, which does not require a bond, the Defendants have rendered any issue as to security for the preliminary injunction order moot.

COUNTER-STATEMENT OF FACTS

I. The Parties

Opportunity Partners is an Ohio limited partnership that is a shareholder of Hill common stock. (A84.) Opportunity Partners seeks to present two director nominees – Andrew Dakos and Phillip Goldstein – and two shareholder proposals at Hill's 2015 annual meeting. (A93; B2-3.)

Hill is a Delaware corporation headquartered in Philadelphia, Pennsylvania and is in the business of project and construction management. Hill's common stock is traded on the NYSE. (A84; B6-7.) As set forth in Hill's 2014 Annual Report, Hill has substantially underperformed its peer group since 2009, such that an investment in Hill in 2009 would have yielded a loss of 39% through the end of 2014, while an investment in Hill's peer group companies would have yielded, on average, a 25% gain. (A84.) Despite Hill's poor performance, in 2014, Hill's executive and director compensation was reported to be over $10 million, with the bulk of that compensation going to the father and son team of CEO David L. Richter and Board Chairman Irvin E. Richter. (*Id*.) Hill's 2015 proxy statement reports that its directors and officers own over 25% of Hill's common stock. (D.I. 1 Ex. C, at p. 32.)

The other Defendants-Appellants in this case are the seven members of Hill's Board of Directors. Two of the seven director seats are open for election this year.

II. The Company's Advance Notice Bylaws

Hill's Amended and Restated Bylaws contain advance notice provisions, requiring a shareholder seeking to present a proposal or to nominate directors at the Company's annual meeting to give written notice to the Secretary of the Company within a certain time frame. The timing provisions are identical for both director nominations (set forth in Bylaws Section 3.3) and shareholder proposals (set forth in Bylaws Section 2.2), as follows:

> To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the meeting; provided however, that in the event that less than seventy (70) days notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by the stockholder, to be timely, must be received no later than the close of business on the tenth (10th) day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs.

(A6-7; A10; B3.)

Thus, the bylaw requires notice to be given within a 30-day window that is between 60 and 90 days before the annual meeting date in any particular year ("30-Day Window"), except that if "less than seventy (70) days notice or prior public disclosure of the date of the annual meeting is given or made to stockholders," a

shareholder has ten days from the notice or public disclosure date to deliver an advance notice letter (the "10-Day Rule"). *Id.*[4]

The Bylaws also require the annual meeting to be held "on such date and at such time as may be fixed by the Board of Directors and stated in the notice of the meeting." (A6.)

III. The Board Fixes And Announces The June 9, 2015 Annual Meeting Date And Plaintiff Delivers Advance Notice

On March 12, 2015, the Hill's directors fixed the 2015 annual meeting date to be June 9, 2015. (A53-55.) On April 30, 2014, Hill first publicly disclosed the June 9, 2015 annual meeting date. (A59.) Plaintiff delivered a letter on May 7, 2015 pursuant to the Bylaw's 10-Day Rule. (A71-76.) On May 11, 2015, Hill's CEO David Richter sent a letter rejecting the May 7th letter as untimely.[5] (A77-80.)

IV. The Proceedings In The Court of Chancery

On May 14, 2015, Plaintiff filed a Complaint and a Motion For Preliminary Injunctive Relief in the Court of Chancery, which Defendants opposed on May 22,

[4] A shareholder always has at least 10 days from disclosure of the meeting date to deliver an advance notice letter to the Company. If the annual meeting date is announced more than 70 days before it takes place, then a shareholder would have more than 10 days to deliver the notice.

[5] Before the June 9, 2015 meeting date was ever announced, Plaintiff delivered an advance notice letter dated April 13, 2015. (A89; B14.) Defendants responded by inviting Plaintiff's representatives to meet them at Hill's offices, but then several weeks later, Defendants asserted that the April letter was "non-complaint." Plaintiff continues to dispute that contention, but the lower court did not rule on that issue. *See* June 5 Order ¶ 9 ("the court need not consider any arguments about whether the April 13 letter was compliant"). Because that April letter is not the subject of this appeal, Plaintiff does not respond to the nine pages of argument that Defendants devote to it. The only question before this Court is whether the May 7, 2015 letter was timely.

2015. Defendants never requested an injunction bond or asserted any monetary damage in their opposition papers or at the hearing held on June 5, 2015. The Court of Chancery issued its June 5 Order Granting Preliminary Injunction, which ruled:

> 7. On March 12, 2015, the Company's board of directors met and fixed the time and date of the annual meeting for 9:00 a.m. on Tuesday, June 9, 2015. The first time the Company gave notice or publicly disclosed "the date of the meeting" was in the proxy materials distributed April 30, 2015. That public disclosure came 40 days before the meeting date, thereby triggering the 10-day window for submissions under the Advanced Notice Bylaws. The Company could have triggered the requirement for 60-90 days advanced notice by announcing the specific date of the meeting on March 12, which was 92 days before the meeting date. Or the Company could have announced a specific date earlier. Because the Company waited to announce the specific meeting date, the 10-day window applies.
>
> 8. The 2014 proxy statement gave a range of dates for submitting proposals assuming the annual meeting happened "on or about" the anticipated date. Those dates were not binding on the stockholders. The Advanced Notice Bylaws control the timing for stockholder submissions, and they based the requisite time period off the actual date of the meeting, not a possible future date.
>
> 9. The Notice was submitted on May 7, 2015. It was timely for purposes of the Advanced Notice Bylaws. The Company does not dispute that the Notice otherwise complied with the requirements of the Advanced Notice Bylaws. Because the Notice was compliant, the court need not consider any arguments about whether the April 13 letter was compliant.
>
> 10. By contending that the Notice was untimely and refusing to permit the Fund to present its proposals and nominees, the Company is violating the plain language of its Bylaws. The undisputed facts clearly establish a reasonable probability of success on the merits of the Fund's claim for breach. Indeed, the undisputed

> facts are sufficient to support a grant of summary judgment and hence entitle the Fund to mandatory injunctive relief. In light of this holding, the court need not reach any of the arguments about whether the defendants have acted inequitably.
>
> * * *
>
> 13. The Company is enjoined from conducting any business at the Annual Meeting on June 9, 2015, other than convening the meeting for the sole purpose of adjourning it for a minimum of 21 days. At the adjourned Annual Meeting, the Company shall permit the Fund to present the items of business and nominations set forth in the Notice.

June 5 Order at ¶¶7-10, 13.

On June 10, 2015 Defendants filed a Motion For Entry of Partial Final Judgment Under Rule 54(b) Or, In the Alternative, Application For Certification Of Interlocutory Appeal. D.I. 25. At that time, Defendants never asserted any monetary harm or the need for an injunction bond. Plaintiff opposed that motion on June 16, 2015. (B34-66.) The Court of Chancery issued its Order Entering Partial Final Judgment on June 16, 2015, the reasoning of which is set forth below:

> 4. There are statements in the Company's application that are designed to make the Injunction Order sound harsh. For example, the Company claims that as a result of the Injunction Order, "the Company's advance notice bylaws (and those of any other company with similarly-phrased bylaws) are rendered inoperative." That is both alarmist and wrong. The Advanced Notice Bylaws contemplate the possibility of the Company receiving notice within a 10-day window following the fixing of the meeting date. The Injunction Order enforced that aspect of the Advanced Notice Bylaws. It is hard to see how enforcing the Advanced Notice Bylaws renders them inoperative.

> 5. The Company also asserts that the Injunction Order "runs contrary to the Company's own interpretation and its consistent prior practice, as well as the fundamental purposes served by advanced notice bylaws." Taking these points in reverse order, the Injunction Order did not defeat the "fundamental purposes served by advanced notice bylaws." The purpose of an advanced notice bylaw is to give a company advance notice of matters to be considered at a meeting of stockholders so that the Company is not surprised by a proposal from the floor. *See Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd*., 924 A.2d 228, 239 (Del. Ch. 2007). That purpose has been served. Nor, as I understand Delaware's approach to contract interpretation, is past practice or one side's unilateral interpretation controlling. *See id*. Moreover, if a bylaw is ambiguous, "doubt is resolved in favor of the stockholders' electoral rights." *Id*. In short, it is hard for me to believe that the ruling embodied in the Injunction Order represents the "infrequent harsh case."
>
> 6. More persuasive to my mind is the importance of providing an opportunity for timely appellate review of a mandatory injunction. This trial judge is certainly not infallible. Assuming for purposes of analysis that the Injunction Order is erroneous, then unless it is reversed on appeal, the Company will be forced to permit its stockholders to consider at the Annual Meeting the nominations and items of business that the Fund seeks to present. It will not be possible to go back in time and undo that event following post-Annual Meeting appellate review. It would be "harsh" (in my estimation) not to facilitate the Company's only opportunity to correct in a timely fashion what it believes to be my mistake.

June 16 Order at ¶¶ 4-6.

V. Defendants Move Hill's Annual Meeting Date Well Beyond The Minimum Required By The Chancery Court's Order And Concede That The Extra Time Is Sufficient

On June 9, 2015, Hill's annual meeting was adjourned to be reconvened two months later on August 7, 2015. This extension of two months was three times as long as was required by the Court of Chancery for a fair election. Hill's CEO

David Richter explained that the reason for the lengthy delay was to give the incumbents enough time to respond to the opposition to "make certain" that their slate would be re-elected:

> On Friday last week, the court sided with Bulldog. We will be appealing that decision, but in the meantime we adjourned today's annual stockholders meeting for two months to give time for our appeal to be considered and also to allow us time to communicate with our stockholders in order ***to make certain that when board elections are held we continue to have the support of the majority of our stockholders and that our board-nominated candidates are re-elected***.

(B52-56.) (emphasis added).

ARGUMENT

I. The Court Of Chancery Correctly Determined That The Company Violated Its Bylaws

A. Question Presented:

Did the Court of Chancery err when, in interpreting Hill's advance bylaw provision, it found the phrase "prior public disclosure of the date of the annual meeting" to have a "plain, common or normal meaning" and concluded that the advance notice deadline under Hill's bylaws was not triggered when the Company disclosed an anticipated "on or about" meeting date, rather than the actual date of the meeting? (June 5 Order ¶¶ 5, 6, 8; June 16 Order ¶¶ 2, 4).

B. Scope Of Review:

The construction or interpretation of a corporate bylaw is a question of law subject to *de novo* review. *Centaur Partners, IV v. National Intergroup, Inc*., 582 A.2d 923, 926 (Del. 1990).

C. Merits Of The Argument:

1. The Court of Chancery Correctly Interpreted and Enforced Hill's Advance Notice Bylaws

The advance notice bylaw provision at issue – the 10-Day Rule - gives stockholders a notice deadline of not later than ten days from the announcement of the annual meeting date:

> in the event that less than seventy (70) days notice or prior public disclosure of the date of the meeting is given or made to stockholders.

A6-7 at § 2.2; A10 at § 3.3; June 5 Order ¶ 3.

Contrary to Defendants' repeated assertions, there was no facial challenge to its advance notice bylaws in the lower court. The dispute that is now on appeal is about the meaning of a short phrase in the bylaws -- "prior public disclosure of the date of the annual meeting." The question determined by the Court of Chancery was whether it meant an announcement of a predicted "possible future date" or an announcement of the "actual" meeting date. June 5 Order at ¶¶ 5-6. The Court of Chancery interpreted the bylaws using contractual principles and giving the phrase its "plain, common or normal meaning." June 5 Order at ¶2 (citing *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 895 n.65 (Del. 2015)); *Id*. at ¶5 ("The plain language of the reference to 'prior public disclosure' contemplates a public filing that states the date of the meeting, but like a notice, it must state the actual date of the meeting."); June 16 Order ¶ 2 ("The Injunction Order ruled on the plain language of the Advance Notice Bylaws").[6]

Defendants ask this Court to reject what the Court of Chancery found to be the plain, common and normal meaning of the bylaw's words. They contend that

[6] A corporation's bylaws and charter are contracts among its shareholders. *Jana Master Fund, Ltd. v. CNET Networks, Inc*., 954 A.2d 335, 338, *aff'd* 947 A.2d 1120 (Del. 2008). "Delaware law adheres to the objective theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). "To the extent there is any ambiguity in interpreting bylaws, 'doubt is resolved in favor of the stockholders' electoral rights.'" *Jana*, 954 A.2d at 339, *aff'd* 947 A.2d 1120 (Del. 2008).

their interpretation is the only reasonable interpretation: "Both Bulldog and the Court of Chancery engraft into the Advance Notice Bylaws a requirement that both 'notice' and 'prior public disclosure' of the date of the Annual Meeting be of an exact date. … [T]his construction is at odds with the plain language of the Bylaws." Defs. Br. at 20 (emphasis added).[7]

But it is Defendants' interpretation that is at odds with the plain language of the Bylaw. The phrase "date of the annual meeting" nowhere indicates that it should be read to include a range of "anticipated" "on or about" dates, which Defendants characterize merely as "expected," "predicted," and "approximate."[8] Those terms all signify a prediction of a date that is not definite, which the Court of Chancery correctly described as a "possible future date." June 5 Order at ¶8. Defendants' new strategy is to use the term "reference date" (Defs. Br. at p. 17), but that term still appears nowhere in the Bylaw.

Nor does it help Defendants to contend that the bylaw could be triggered when the Company discloses that ***there will be a meeting*** in the following year. *See, e.g.*, Defs. Br. at p. 23 ("the Company provided 'prior public disclosure' *of the*

[7] Defendants do not assert that the bylaws are ambiguous, but that the Chancery Court adopted an interpretation that plainly wrong. *See* A124 ("Hill's Bylaws are crystal clear."); A127 ("Hill's Bylaws are clear"); Defs. Br. at p. 18 (asserting that the Court of Chancery "derived an unsound construction [of the bylaws] that runs contrary to their plain meaning").

[8] Defendants' Response in Opposition to Plaintiff's Motion for Preliminary Injunction at A123, A124, A129, A130, A138, A147 ("***anticipated*** date"); *id.* at A141 ("***predicted*** date"); *id*. at pp. A138, A139, A141 ("the ***expected*** date"); *id*. at A147 ("***approximate date***"); *id.* at A123, A125, A129, A 138, A139, A140, A147 ("***on or about***" date).

2015 Annual Meeting over one year earlier").[9] Accordingly, the Court of Chancery correctly ruled that the plain words of the bylaw indicate that the advance notice deadline is triggered when the Company first discloses (whether in the formal meeting notice, or in a press release or other public filing) the actual annual meeting date. A6-7 §2.2; A10 §3.3; June 5 Order ¶ 4, 5. *Sherwood v. Ngon, supra*, at *11 (applying similar bylaw language and ruling that, when an annual meeting is postponed, the bylaw would be triggered using the new annual meeting date – the actual annual meeting date – rather than the original date selected).

2. Defendants' Purported "Prior Practice" Is Irrelevant And There Is No Supporting Evidence In The Record

Defendants contend that the Court of Chancery erred because it "invalidated the Company's correct and consistent interpretation and application of the 30-Day Window Bylaw." Defs. Br. at p. 17. But in granting the injunction, the Court of Chancery did not invalidate anything; it simply applied the bylaw's plain meaning without regard to Defendants' self-serving statements about what they purportedly thought the bylaw meant. As explained in *Openwave Sys. Inc. v. Harbinger*

[9] This rhetorical trick flows throughout Hill's argument. *See, e.g.*, Defs. Br. at p. 5 (asserting that the bylaw could be triggered by "'prior public disclosure' of the Meeting"); *id*. at p. 14 ("Bulldog argued that the public disclosure of the 2015 Annual Meeting was without any legal effect"); *id*. at p. 16 ("Bulldog's facial challenge to the sufficiency and effectiveness of the Company's public disclosure of the 2015 Annual Meeting"); *id*. at 19-20 (asserting that Court of Chancery reasoning was incorrect because it concluded that information in the 2014 Proxy "did not provide 'prior public disclosure' of the 2015 Annual Meeting").

Capital Partners Master Fund I, Ltd., 924 A.2d 228, 239 (Del. Ch. 2007) (Lamb, VC):

> If the bylaw's language is unambiguous, the court need not interpret it or search for the parties' intent. The bylaw is construed as it is written, and the language, if simple and unambiguous, is given the force and effect required."

(footnotes omitted); s*ee also Levitt Corp. v. Office Depot, Inc*., 2008 WL 1724244, at *5 (Del. Ch. Apr. 14, 2008) (court looks to "words found in instrument," which if unambiguous, are to be accorded ordinary meaning).

There is no basis for Defendants to even offer up extrinsic evidence in this way, when they assert that the bylaws are not ambiguous but clear. Also, "'doubt is resolved in favor of the stockholders' electoral rights.'" June 16 Order at ¶ 5, *quoting Openwave Sys. Inc.*, 924 A.2d at 239). Moreover, Defendants complain that the lower court overlooked their "prior interpretation," when there is no evidence that Hill has received or considered an advance notice letter before this dispute.[10]

[10] And nothing about Hill's annual meeting dates is consistent except that the meetings almost never occur on the "predicted" date." (*See* A156 at n. 3; A 26, 28, 30, 32, 34, 37, 39, 41, 43, 48, 50, 52.) (Hill's only "anticipated date" prediction that was accurate was in the 2010 proxy statement for the 2011 meeting).

3. Defendants' Theory Of Applying An Anticipated Date Is Incoherent And Would License Corporations To Interfere With The Shareholder Franchise

Defendants incorrectly argue that Opportunity Partners must show that it was "confused" or "blindsided" by the Bylaw without any legal authority for that proposition. Defs. Br. at p. 17. Plaintiff never contended it was confused. Both the Plaintiff and the Court of Chancery agreed that the Bylaw was not confusing but clear. However, if the Court were to adopt Defendants' own theory that an "anticipated" date could trigger the calculation of the 30-Day Window, it would remain unclear whether the actual window would be calculated using the "anticipated" date or the "actual" date. Defendants admit that they are confused by this question and do not know the answer:

> And for reasons relating to schedules, people's schedules, all the directors – we want them all there – whatever room we need to hold the thing in, whatever, they chose June 9th, not June 10th . . . Now there is some discussion and confusion about whether it would be June 10th or June 9th and whether that would produce April 10th or April 11th. It doesn't matter. It's totally irrelevant in this case.[11]

But to a shareholder, the bylaw deadline is not "irrelevant." The problem gets worse as the gap between the anticipated date and the actual date increases. And if the bylaw can be triggered by Hill's predictions, then there is additional

[11] *See* A188 (June 5, 2015 Transcript) at p. 20, l.7-14.

confusion about whether to use Hill's predicted date or its predicted 30-day window as listed in the proxy statement.[12]

For example, in 2009 the "anticipated date" for the 2010 meeting was June 10, 2010, but when the meeting date was fixed the next year, the actual date turned out to be June 4. 2010. *Compare* D.I. 7, Ex. C, A30 (predicting June 10, 2010) *with* D.I. 7 Ex. C, A32 (announcing June 4, 2010). At the same time, the 2009 proxy told shareholders that the 30-Day Window for 2010 would close on April 15, 2010. *See* D.I. 7, Ex. C, A30. Hill has not explained whether, pursuant to its "prediction" theory, the 30-Day Window should have closed on April 5, 2010 (using June 4 date) or on April 11, 2010 (using June 10 date) or on April 15, 2010 (using the predicted window listed in the proxy statement). Potentially, the board of directors could assert that notices delivered between April 5 and April 15 would be untimely, even though the 2010 meeting date was not finally disclosed until April 30. While the Court of Chancery did not have to address this question, it would have to do so if its Orders were reversed in this appeal.

Defendants contend that "it can't make any difference" (A195 at ln. 8-10.), but it does make a difference to Hill's shareholders and shareholders of "numerous Delaware corporations that have similar bylaws" (Defs. Br. at p. 21) that must

[12] Defendants admit that they created confusion by providing a predicted date and a predicted 30-day window. A188 at l. 22 – A189 l. 4 ("There is also another element of confusion that I would have to admit to, which is that the proxy material tells shareholders … if they want to make proposals that are not to be included in the company's proxy material, they have until April 15.").

know how to comply. If adopted by this Court, Defendants' "on or about" announcement theory would be another tool for incumbent boards to keep the opposition off of the ballot, undermining the most fundamental principle of Delaware corporate law – that the shareholder franchise is sacred.[13]

4. The Purpose of the Advance Notice Bylaw Has Been Met Because The Incumbents Have Given Themselves Sufficient Time to Respond To The Opposition Slate

Defendants cannot be heard to complain that the 10-Day Rule does not give them enough notice. They have complete control of the election process. They set the annual meeting date; and they determine when that date will be publicly disclosed. If Defendants would have preferred to have the benefit of the 30-Day Window, they could have announced the annual meeting date no later than March 31, 2015. June 5 Order at ¶ 7. They did not do that. *Id*.

Having control over the election machinery is a powerful advantage to the incumbents as illustrated in this case. While the Court of Chancery ordered them to wait at least 21 days before holding the election to permit a free and fair election, they decided to give themselves 60 days "to make certain … that [their own] board nominated directors are re-elected." (B54.) By unilaterally moving the meeting date to a point that they concede is sufficient "fair warning" to respond to the

[13] *Blasius Indus., Inc. v. Atlas Corp*., 564 A.2d 651, 659 (Del. Ch. 1988) ("the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests").

opposition and ensure the re-election of their own directors in the proxy contest, the Defendants cannot now complain that they do not have the sufficient notice that is the sole purpose of advance notice bylaws.[14]

Still they appear before this Court, using their unlimited access to shareholder money to pursue the claim, the only purpose of which is to permit them to run unopposed and therefore to deny shareholders any other choice of candidates for the two board seats.[15] Instead of making their case to the shareholders, the incumbents want to "win" re-election in the Delaware courts. If they were to succeed, however, it would be the disenfranchised public shareholders who would suffer.

Delaware corporation law is wary of this potential for advance notice bylaws to be used improperly by incumbent directors so as to impede shareholder democracy. Fiduciaries must vigorously protect the shareholders' right to choose

[14] *Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228 (Del. Ch. 2007) (Advance notice bylaws "are designed and function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations"); *Jana Master Fund*, 954 A.2d at 344 *aff'd* 947 A.2d 1120 (Del. 2008) ("An advance notice bylaw is one that requires stockholders wishing to make nominations or proposals at a corporation's annual meeting to give notice of their intention in advance of so doing").

[15] Moreover, when a board moves an election far into the future for the express purpose of helping them with their campaign to win, they have the burden to show that their action was in the interest of the corporation and its shareholders. *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1207 (Del. Ch. 1987) ("When the election machinery appears, at least facially, to have been manipulated, those in charge of the election have the burden of persuasion to justify their actions").

their own directors.[16] The only legitimate purpose of the advance notice bylaw – fair notice to ensure orderly elections – has been met here.

[16] *Schnell v. Chris-Craft Indus., Inc*., 285 A.2d 437, 439 (Del. Supr. 1971) (board of directors may not use "corporate machinery … for the purpose of obstructing the legitimate efforts of dissident shareholders in the exercise of their rights to undertake a proxy contest against management"); *Aprahamian v. HBO & Co*., 531 A.2d 1204, 1206-07 (Del. Ch. 1987) ("those in charge of the election machinery must be held to the highest standards in providing for and conducting corporate elections;" and elections are to conducted fairly "without any advantage being conferred or denied to any candidate"); *Sherwood*, 2011 WL 6355209, at *15 ("Defendants have not simply expressed their disagreement with [plaintiff's] positions or dissatisfaction with his personal behavior; they also have excluded him from merely running for election, [which] would not comport with the 'scrupulous fairness' required of corporate elections"); *Lerman v. Diagnostic Data, Inc*., 421 A.2d 906, 914 (Del. Ch. 1980) (board cannot impose a 70 day advance notice rule when the meeting was announced 63 days ahead of time); *Levitt Corp. v. Office Depot*, 2008 WL 1724244, at *3 (Del. Ch. Apr. 14, 2008) ("given the special prominence of the shareholder franchise under Delaware law, restrictions that are not clear and unambiguous should not be interpreted to limit shareholder democracy.").

II. The Court Of Chancery Properly Granted The Preliminary Injunction And Final Order

A. Question Presented:

Did the Court of Chancery err in entering the preliminary injunction and final order based on the plain meaning of the Company's advance notice bylaws?

B. Scope Of Review:

A trial court's decision to grant or refuse injunctive relief is reviewed for abuse of discretion "without deference to the embedded legal conclusions of the trial court." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996).

C. Merits Of The Argument:

1. The Court Of Chancery Properly Granted The Preliminary Injunction And Final Order Based On The Undisputed Facts And The Bylaw Language

To obtain a preliminary injunction, a plaintiff must show (i) a reasonable probability of success on the merits, (ii) a reasonable likelihood that the plaintiff will suffer irreparable harm absent the injunction, and (iii) that the harm to the plaintiff if relief is denied outweighs the harm to defendants if relief is granted. *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.'and Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1066 (Del 2014).

The Court of Chancery correctly made the requisite determinations. The Court of Chancery held that: "[t]he undisputed facts clearly establish a reasonable probability of success on the merits of [Plaintiff's] claim for breach. Indeed, the

undisputed facts are sufficient to support a grant of summary judgment and hence entitle [Plaintiff] to mandatory injunctive relief." June 5 Order at ¶ 10. The Court of Chancery also determined that Plaintiff showed that it would suffer irreparable harm absent injunctive relief (June 5 Order at ¶ 11 (citing *Hubbard v. Hollywood Park Realty Enterprises, Inc*., 1991 WL 3151 (Del. Ch. Jan. 14, 1991)) and that the balance of equities favored Plaintiff. *Id*. at ¶ 12 (citing *Aprahamian v. HBO & Co*., 531 A.2d 1204, 1208 (Del. Ch. 1987)). The Court held that Plaintiff was entitled to injunctive relief based upon facts that were not in dispute. *See City Capital Associates Ltd. Partnership v. Interco, Inc.*, 551 A.2d 787, 795 (Del. Ch.1988), overruled on other grounds by *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1153 (Del.1989).

The only error Defendants assign to such holdings is that:

> The Court of Chancery based its entry of injunctive relief upon its erroneous construction of the Advanced Notice Bylaws and, therefore, erred in concluding that Bulldog demonstrated a reasonable probability of success on the merits. The Court of Chancery also incorrectly determined that Bulldog faced irreparable harm in the absence of an injunction and that the balance of the equities favored injunctive relief (Ex. A ¶¶ 11-12); on the contrary, any harm to Bulldog was self-inflicted due to its own failure to comply with the Advance Notice Bylaws.

Br. at 25.

For the reasons set forth under Argument I, *supra*, the Court correctly interpreted Hill's bylaws and therefore, correctly granted the injunction.

2. The Court Of Chancery Did Not Abuse Its Discretion By Failing To Require The Posting Of Security

Defendants also argue that the Court of Chancery "compounded [its] errors" by failing to require the injunctive relief to be conditioned upon the posting of *some* amount of security. Defs. Br. at p. 25. A party seeking an injunction bond "must support its application with 'facts of record or some realistic as opposed to a yet-unproven legal theory from which damages could flow to the party enjoined.'" *Guzzetta v. Serv. Corp. of Westover Hills*, 7 A.3d 467, 470 (Del. 2010). Here, Defendants made no such application for a security bond and made no effort to identify or provide a credible estimate of potential damages.[17] Moreover, the Defendants sought to convert the preliminary injunction into a final order so that they could pursue an appeal, and thus rendered any question as to a bond, even it if had been properly raised in the lower court, moot. Finally, the Defendants' newly asserted purported "monetary loss" appears to be nothing more than a hypothetical. Incumbents do not have the right to remain in office or to run unopposed in the elections, and suffer no monetary loss from facing a contested election. *Aprahamian*, 531 A.2d at 1207.

[17]Even if Defendants had made the requisite showing, the appropriate amount of security, if required at all, would undoubtedly have been low. *See, e.g.*, *Levco Alternative Fund, Ltd. v. Reader's Digest Ass'n*, 2002 WL 31835461, at *1 (Del. Ch. Aug. 14, 2002) (conditioning injunction against 54 recapitalization on bond of $5,000); *Solar Cells, Inc. v. True N. P'rs, LLC*, 2002 WL 749163, at *8 (Del. Ch. Apr. 25, 2002) (conditioning injunction against merger on bond of $2,500).

Accordingly, Hill's request to vacate the Court of Chancery's Orders granting injunctive relief should be denied in its entirety.

CONCLUSION

For the foregoing reasons, Plaintiff Opportunity Partners L.P. respectfully requests that the Court of Chancery's Order Granting Plaintiff's Preliminary Injunction and the Court of Chancery's Order Granting Partial Final Judgment be Affirmed, and any further relief that the Court deems proper under the circumstances.

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